United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig w/affidavit of mailing

75-1196

To be argued by
VICTOR J. ROCCO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1196

UNITED STATES OF AMERICA,

Appellee,

—against—

WILLIAM JOHNSON,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York,
225 Cadman Plaza East,
Brooklyn, New York 11201.

VICTOR J. ROCCO,
Assistant United States Attorney,
(Of Counsel).

UNITED STATES COURT OF APPEALS
FILED
AUG 4 1975
DANIEL FUSARO, CLERK
SECOND CIRCUIT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1196

UNITED STATES OF AMERICA,

Appellee,

—against—

WILLIAM JOHNSON,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant, William Johnson, appeals from a judgment of the United States District Court for the Eastern District of New York (Neaher, *J.*) entered May 16, 1975, following trial by the Court, convicting him on two counts of a three count indictment of bank robbery, 18 U.S.C. § 2113(a) and § 2, and armed bank robbery, 18 U.S.C. § 2113(d) and § 2, all arising out of the armed robbery on February 29, 1972, of the Kings Lafayette Bank branch at 650 Fulton Street, Brooklyn, New York. Pursuant to the judgment of conviction, appellant was sentenced to five years imprisonment, execution of sentence suspended, and was placed on five years probation on special conditions.

On this appeal, appellant assigns error to the judgment below and requests that this Court reverse the conviction and dismiss the indictment or, in the alternative, direct judgment of acquittal. Specifically, appellant assails the

judgment of conviction on the grounds that: (1) the Government's failure to furnish the defense with an FBI interdepartmental memorandum dealing with appellant's narcotics activities, purportedly Rule 16(a) or Section 3500 material, so impaired the defense in the presentation of its case as to have deprived him of his right to a fair trial; and (2) the Government's purported failure to formally communicate its readiness for trial violated the Eastern District Plan For Achieving Prompt Disposition of Criminal Cases ("Eastern District Plan").

Statement of the Case

(1)

On April 24, 1972, William Johnson was arrested by local and federal authorities in connection with the February 29, 1972 robbery of the Kings Lafayette Bank, 650 Fulton Street, Brooklyn, New York (Tr. 7, 8).[1] At the time of the arrest, after being advised of his rights, the appellant agreed to accompany the arresting officers to the 76th Precinct in Brooklyn for questioning (Tr. 9, 12). Upon his arrival at the precinct, Johnson was advised of his rights for a second time and again agreed to be questioned in connection with the robbery (Tr. 12). During the course of the afternoon, Johnson voluntarily provided the authorities with a detailed narration describing his involvement in the crime and the events leading up to and surrounding the robbery (Tr. 13-15). These admissions, with appellant's consent, were subsequently reduced to a two part written statement implicating Johnson and reciting the details of the crime, the names of most of the other participants and

---

[1] Page numbers in parenthesis, unless otherwise designated, refer to the trial transcript of October 11 and 15, 1974.

their respective roles, the mode of escape and, finally the distribution of the loot (Ex. 3, Tr. 19).[2]

These written statements were prepared by FBI Special Agent Joseph W. Koletar, one of the arresting officers, and both concluded with a signed statement in Johnson's hand acknowledging the statement as true and correct (Tr. 17-20). At the conclusion of the interview, Johnson was brought to FBI headquarters in Manhattan for processing and later that evening lodged at the Federal Detention Center for the night (Tr. 22).

On the following morning, April 25, 1972, Johnson was arraigned before the United States Magistrate who assigned counsel, Joel Winograd, Esq., and set bail at $25,000, with surety bond. At the arraignment, and in appellant's presence, Agent Koletar and the Assistant United States Attorney assigned to the matter advised counsel of Johnson's cooperation and secured his consent to future interviews, in counsel's absence, in the hope of further identifications (Tr. 28, 29, 34).

Pursuant to that arrangement, Agent Koletar and Detective Richard Hodgson of the New York City Police Department interviewed appellant in the detention room at the Federal Courthouse in Brooklyn on May 1, 1972 (Tr. 22). After signing an FBI waiver of right form, appellant was shown an array of six photographs from which he identified Virgil Lee Woods as a man who was present when the bank loot was distributed among the participants to the robbery (Tr. 22, 25, 35). Appellant

---

[2] The individuals implicated by the statement, Mervyn Barry, Jeffery Bonner, Earl Rozier and Randolph Randy Russell have since plead guilty to lesser counts (bank larceny and/or conspiracy) in connection with the robbery. Edward Davis, also identified by Johnson as a participant, has been certified as incompetent and is presently committed to Matteawan State Hospital (Tr. 52-53).

signed and dated the photograph of Woods and an accompanying statement indicating that Woods had been present when the appellant received his share of the proceeds (Ex. 6; Tr. 36-38).[3]

Two days later, on May 3, 1972, Johnson was escorted, pursuant to court order, by the three arresting officers to the Bureau of Criminal Identification of the New York City Police Department for the purpose of reviewing mug shots on file with the Police Department in an effort to determine the identity of the driver of the getaway car (Tr. 40-41). Though unable to identify any of the participants from the mug shots, appellant did identify the photograph of Gertrude "Trudy" Register from a photographic array as the unidentified woman referred to in the April 24th statement who was present when the proceeds of the robbery were distributed among the participants (Tr. 42-43).

On May 26, 1972, Agent Koletar met with Johnson again in the Marshal's office at the federal courthouse in Brooklyn to probe further into appellant's admitted narcotics use and drug trafficking at Fort Riley, Kansas, where he was then stationed as a sergeant (E-5) assigned to "B" Company, 1st Battalion, 18th Infantry (Tr. 190). Though Johnson testified that he balked at the prospect of undercover drug work or testifying on behalf of the Government (Tr. 116), he identified his heroin contacts at Fort Riley and in Brooklyn, including one Richard Garbelotto and the circumstances of his involvement in drug traffic (F.B.I. Memorandum, May 30, 1972). During one of these "runs" sometime in October, 1971, appellant, fearful that he had been "set up", disposed of a package of heroin with a street value approximating $16,000 (Tr. 197; F.B.I. Memorandum, May 30, 1972). Unable to ac-

---

[3] Virgil Lee Woods subsequently was arrested and admitted a limited involvement in the robbery. He was not prosecuted (Tr. 54).

count for the heroin or its proceeds, Johnson and his wife were thereafter subjects of threats of physical evidence.

Johnson admitted to Agent Koletar, who took notes throughout the interview, that he used a large part of his share of the bank proceeds to buy these people of (Tr. 195). This information was reduced to writing four days later and incorporated into an FBI intelligence memorandum concerning narcotics matters to the Special Agent in Charge (SAC), New York, recommending that the information be forwarded to appropriate federal and local agencies, including the Criminal Investigation Division, United States Army, Fort Riley, Kansas (F.B.I. Memorandum, May 30, 1972).[4]

At the suppression hearing on May 15, 1973, Johnson testified that he "went along" with a program of cooperation until his wife gave birth to the baby she was then expecting, while fully intending to contest vigorously the charges when the baby was born (See transcript of May 15, 1973, pp. 204-205). In short, the cooperation was a ploy designed to delay prosecution on the underlying charges.

(2)

Appellant first appeared before the court (Rosling, *J.*) on May 26, 1972 for waiver of indictment (see transcript of May 26, 1972) based on the plea negotiations with the Government and the possibility of drug treatment under the Narcotics Addiction Reform Act (NARA) (See transcript of May 15, 1973 at p. 122-123). Appellant's counsel was not present and the matter was marked off the Court's calendar (See transcript of May 26, 1972, at p. 2). The

[4] On May 26, appellant Johnson also identified a photograph of Samuel McDuffie from a six spread array as the driver of the getaway car on the date of the robbery. At Koletar's request, Johnson executed a short written statement prepared by Koletar to that effect. McDuffie was subsequently convicted after trial on charges arising out of his participation in the robbery.

case was next scheduled for June 19, 1972, again for waiver of indictment; and once again was marked off when, despite a prior agreement to the contrary, it appeared that there would be no waiver (See transcript of June 19, 1972).

Subsequent to the June 19th appearance, the case was reassigned to Judge Neaher and was next before the court on July 28, 1972, again for waiver and a plea. Shortly before the appearance Johnson indicated to the Assistant United States Attorney that there would be no plea (See transcript July 28, 1972, pp. 3-5). Application for a reduction in bail was made and the court reserved decision until August 2, 1972, pending the return of an indictment (*Id.*, at pp. 6, 20).

On August 2, 1972, Johnson plead not guilty to a three count indictment. At the arraignment bail was reduced to $25,000 personal surety (10% cash) on Johnson's representation that a member of his family would post bond (See transcript of August 2, 1972, pp. 3, 12). On inquiry of the Court, counsel for defense indicated that he would be prepared to proceed to trial in "the next month or two" and agreed to appear sometime after Labor Day for purpose of fixing a trial date (*Id.*, at pp. 13-14). On October 25, 1972, a trial date was fixed for December 11, 1972.* Counsel for the defendant, however, failed to appear for trial on December 11, 1972. The Government, after informing the Court that it was prepared to proceed to trial, consented to an adjournment to January 8, 1973 (See transcript of December 11, 1972).

On January 8, 1973, assigned counsel confirmed the Government's earlier representations to the Court that a plea to a reduced charge was in fact to have been entered

---

* The transcript of the October 25th proceeding does not exist. But Judge Neaher in his opinion referred to this date. (Memorandum and Order, March 23, 1973, p. 5).

upon information and moved to be relieved as counsel for "philosophical reasons" (See transcript of January 8, 1973, pp. 3-5). Because appellant expressed a desire to proceed *pro se*, the matter was adjourned to January 10, 1973, when the Court granted the application to withdraw and appointed Allen Lashley, Esq., to act as standby counsel to assist appellant in the presentation of his defense. At the suggestion of newly appointed counsel, the trial was adjourned 45 days pending psychiatric observation to determine whether Johnson was competent to stand trial (See transcript of January 10, 1973, pp. 3-4). An order directing that Johnson submit to a medical examination for study and report at the medical center for Federal Prisoners at Springfield, Missouri, was submitted and signed on January 22, 1973.

On March 23, 1973, counsel were notified that Johnson was competent to stand trial and that a third trial date would be set on his return to New York (Memorandum and Order, November 23, 1973, p. 4). On April 6, 1973, the defense served an omnibus notice of motion, returnable April 13, 1973, requesting a Bill of Particulars, general discovery and inspection and a suppression hearing to determine the admissibility of certain statements. The motion was heard on the return date, and during the course of argument, the Government agreed to produce all written or recorded statements or confessions pursuant to Rule 16(a). With the limited exception of the FBI intelligence memorandum of May 30, 1972, the Government thereafter produced all statements made by the appellant and all reports concerning the same.

A trial date was fixed for May 7, 1973 and subsequently adjourned on consent to May 15, 1973. On May 15, 1973, appellant moved to dismiss the indictment because of the Government's alleged failure to comply with the speedy trial rules promulgated by the Eastern District.

Five months later, on November 23, 1973, the trial court denied the motion to dismiss on the ground that the delay, if any, was attributable exclusively to appellant's requests for adjournments and admitted negotiations with the Government with respect to possible cooperation and disposition of the charges by plea (Memorandum and Order, November 23, 1973, pp. 9-11). These factors, conjoined with others, tolled the running of the time limitations specified in Rules 3 and 4 so that the Government's readiness on December 11, 1972 was indeed timely (*Id.*, at p. 11).

On December 5, 1973, the trial court denied appellant's motion to suppress insofar as it sought to exclude the April 24, May 1 and May 3 admissions, but granted it to the extent that it sought to suppress the May 26 statement implicating Samuel McDuffie as driver of the getaway car on the day of the robbery (Memorandum and Order, December 5, 1973, p. 8). On October 11, 1974, the trial, on two of the three counts in the indictment, commenced before the court sitting without a jury.[5]

The Trial

Aside from stipulations of fact that the Kings Lafayette Bank, a federally insured depository, was robbed of some $89,000.00 on February 29, 1972 by five armed males, the Government's direct case consisted solely of the testimony of the arresting officers and the voluntary pre-trial admissions of the appellant accompanied by certain documents and photographs carrying his signature. Those admissions detailed the events occurring prior to, during and subsequent to the crime, the appellant's role in the crime and the identity of the other participants. There is no question that the evidence as adduced on the Govern-

---

[5] The third count charging Johnson with conspiracy, 18 U.S.C. § 371, was deemed abandoned by the Government prior to trial (Memorandum of Decision, March 11, 1975).

ment's direct case is sufficient to establish guilt beyond a reasonable doubt.

Johnson took the stand and testified in his defense. He admitted to an earlier written acknowledgement of the truth and accuracy of statements attributed to him and admitted in evidence on the Government's direct case, but denied participation in the robbery (Tr. 143-144). The appellant testified that he had simply signed prepared statements, as instructed, without familiarizing himself with their contents and ignorant of the particulars (Tr. 143-144). He was not interested in the contents of the statements and simply did what he was told to prevent further needless questioning (Tr. 143-144). Johnson also admitted that he had been approached on two occasions by participants in the crime in connection with a possible role in the robbery—indeed, he had once gone to a nearby apartment where the plans were discussed—but dismissed the scheme as "crazy" (Tr. 138-140). He also testified that the photographic identifications were of persons he recognized for reasons unrelated to the robbery (Tr. 171). In addition, on direct examination appellant testified that part of the needless questioning by Koletar involved his drug activities and contacts.

On cross-examination, Johnson admitted using narcotics and a previous involvement with Richard Garbelotto (Tr. 174). He denied making an earlier statement to Agent Koletar that he had used his share of the proceeds of the robbery to pay off Garbelotto for drug debts (Tr. 173, 174). No further witnesses were called on behalf of the defense.

In rebuttal, the Government recalled Agent Koletar who testified to a May 26th statement procured in the course of an interview investigating Johnson's drug activities and contacts while at Fort Riley in which Johnson admitted that he had used the proceeds of the robbery to

satisfy a large drug debt with Richard Garbelotto (Tr. 197). At the conclusion of his direct testimony, a copy of the May 30th FBI intelligence memorandum was produced for use by the defense on cross-examination as Section 3500 material.

At the conclusion of the trial the Court reserved decision and on March 11, 1975, rendered its decision finding Johnson guilty on two counts of the indictment. Judgement of conviction was entered on May 16, 1975. The notice of appeal to this Court followed.

ARGUMENT

POINT I

The Government's Failure to Produce An FBI Interdepartmental Memorandum Did Not Deprive Appellant Of His Right To A Fair Trial.

Appellant initially contends that the Government's avowed failure to produce prior to trial an interdepartmental FBI memorandum on an unrelated matter containing an inculpatory statement, requires that the judgment of conviction be reversed. Assuming for present purposes that the memorandum was discoverable, not every technical variation from the general discovery prescriptions in criminal prosecutions requires that a judgment of conviction, founded, as here, on overwhelming evidence of guilt, be set aside. Absent some showing that the defense in fact was prejudiced by the failure to produce, the irregularity, if any, should be ignored as harmless and the judgment of conviction affirmed.

Though access by defense counsel to certain evidence gathered by the Government is secured by both constitutional and statutory protections in federal criminal process, there is a conflict of authority within and among the various circuits as to whether written statements not substantially

verbatim and contemporaneously recorded are "statements or confessions" within the meaning of Rule 16(a)[6]. A number of circuits hold that summarized statements included in reports of FBI agents based on prior conversations and not contemporaneously prepared are exempt from production under Rule 16(a) as internal Government documents prepared in connection with the investigation and prosecution of the case. *United States* v. *Krilich,* 470 F.2d 341 (7th Cir.), *cert. denied,* 411 U.S. 938 (1972); *United States* v. *Fioravanti,* 412 F.2d 407, 411, n. 12 (3d Cir), *cert. denied,* 396 U.S. 837 (1969); *United States* v. *Battaglia,* 410 F.2d 279, 287 (7th Cir.), *cert. denied,* 396 U.S. 848 (1969); *Kaplan* v. *United States,* 375 F.2d 895 (9th Cir. 1967); *Walsh* v. *United States,* 371 F.2d 436 (1st Cir. 1967). The material is discoverable, if at all, the time of trial pursuant to 18 U.S.C. § 3500. *Krilich* v. *United States,* 502 F.2d 680 (7th Cir. 1974); *United States* v. *Battaglia, supra,* 410 F.2d at 287; *United States* v. *Elife,* 43 F.R.D. 23, 25 (S.D.N.Y. 1967). The Eighth and District of Columbia Circuits, on the other hand, have refused to distinguish between verbatim statements and summaries of conversations memorialized after the fact. *United States* v. *Lewis,* 511 F.2d 798 (D.C. Cir. 1975); *United States* v. *Fallen,* 498 F.2d 172 (8th Cir. 1974).

In the absence of a definitive ruling by this Court, district court construction of the rule in this circuit has varied considerably with some decisions requiring production of all the defendant's statements to Government authorities (*United States* v. *Scharf,* 267 F. Supp. 19 [S.D.N.Y. 1967]), while others hold that the rule precludes production of

---

[6] Rule 16(a) provides in relevant part:

> Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government) . . . .

summarized statements included in an investigative report. *United States* v. *Elife, supra.* Still others hold that the Government need not produce any statement that it does not intend to use and does not use at trial in its case in chief. See *United States* v. *Louis Carreau, Inc.*, 42 F.R.D. 408 (S.D.N.Y. 1967).[7]

Here, the May 30th memorandum by Koletar is not a signed verbatim statement or the standard FBI 302 Interview Form prepared in the course of the investigation and prosecution of charges arising out of the robbery of the Kings Lafayette Bank. Instead, it is an intelligence memorandum in an unrelated matter dated some four days after the interview and addressed to the Special Agent in Charge ("SAC") of the New York Office detailing Johnson's drug activities, describing his contacts at Fort Riley, Kansas and in Brooklyn, New York and recommending that the information be forwarded to appropriate federal, local and military officials. Only one sentence in the three page memorandum relates to the robbery charges pending against Johnson in New York. Thus, Koletar reported that Johnson used his "take" from the robbery to pay off one of his drug contacts in Brooklyn (F.B.I. Memorandum, May 30, 1972).

Pursuant to the trial court's order suppressing the May 26th statement identifying McDuffie as the driver of the getaway car, the Government ended its direct case with proof of appellant's statement of May 3, 1972 (Tr. 45, 75). No proof was offered as to subsequent conversations between Johnson and the authorities. It was only after the appellant testified on direct examination (Tr. 116), that he had refused to cooperate with the authorities in con-

---

[7] Appellant further claims that the failure to produce the subject memorandum also violated 18 U.S.C. § 3500. The short answer to appellant's claim of error is that Section 3500 was complied with since the memorandum was produced immediately after Agent Koletar first testified as to the subject its contents on the Government's rebuttal. See *Infra* p. 16.

nection with narcotics dealings at Fort Riley and in New York that he was examined with respect to his May 26th statement (Tr. 172-175). And then, only for the purpose of impeaching his credibility under *Harris* v. *New York*, 401 U.S. 222 (1971) (Tr. 185-186). Finally, Agent Koletar's memorandum concerning the narcotics transactions was immediately turned over on the completion of his direct examination in rebuttal to the defense for use on cross-examination (Tr. 197).

The trial court found that the Government's failure to produce was founded on the good faith belief that production was precluded by the court's earlier order suppressing statements made subsequent to May 3, 1972 (Memorandum and Order, March 11, 1975, p. 16). In addition, in view of the document's attenutated relevance to the prosecution,[8] the more compelling inference is that the failure to produce could easily have been occasioned by a good faith interpretation of Rule 16(a) to apply only to verbatim and contemporaneous statements, not internal government documents prepared in connection with an unrelated matter and reduced to memorandum form some four days after the interview on which it is based.[9] Indeed, the record

---

[8] Insofar as a limited part of the statement may be corroborative of Johnson's participation in the crime, the evidence is cumulative, at best.

[9] The Government acknowledges that in circumstances such as these, where there is serious question as to the producibility of certain materials pursuant to Rule 16(a), the decidedly better practice requires that it reveal to the Court the existence of the materials so as to afford the Court the opportunity to pass on the issues. See *United States* v. *Fallen, supra*, 498 F.2d 172; *United States* v. *Wilkerson*, 456 F.2d 57, 61 (6th Cir. 1972). Undoubtedly, the Government was not justified, despite the obvious confusion in the law (compare: *United States* v. *Feinberg*, 371 F. Supp. 1205 (N.D. Ill., 1974), with *United States* v. *Leta*, 60 F.R.D. 127 (M.D. Pa., 1973), in assuming the responsibliity of finally determining what is producible prior to trial. That error alone, however, does not require that the conviction be reversed. See, e.g., *United States* v. *Wilkerson, supra*, 456 F.2d at 61.

makes it abundantly clear that the Government thought of the material as producible as a statement of Agent Koletar under Section 3500 (Tr. 217-218). Substantial authority would seem to agreed. *United States* v. *Fioravanti, supra*, 412 F.2d at 411, n. 12; *Walsh* v. *United States, supra*, 371 F.2d 436. Obviously, this is not a case where the Government deliberately sets about destroying relevant documents or in bad faith deliberately withholds or, for that matter, intentionally makes no effort to preserve discoverable material. See *United States* v. *Bryant*, 439 F.2d 642 (D.C. Cir. 1971).

Even assuming that the statement should have been produced, the trial court correctly concluded that on the facts of this case appellant has made no showing of any possible harm flowing from the failure to produce the statement before trial. *United States* v. *Lewis*, 511 F.2d 798 (D.C. Cir. 1975), a case not cited by appellant, is illustrative of the type of demonstrated prejudice required to sustain a reversal and remand for a new trial.

In *Lewis*, the Court refused to hold harmless the improper use of a prior oral admission of the defendant, never reduced to written form, that he was addicted to drugs at the time of the arrest. The Government's equivocal representations to defense counsel that it had no admissions that it intended to use, however, were, at the least, misleading and served to undermined a significant element of the defense on charges of possession of dangerous drugs and possession with intent to distribute. Had the defense not been mislead as to the existence of relevant and potentially incriminating statements, his trial preparation and strategy may have been considerably different.

Likewise, inapposite to the present case is *United States* v. *Padrone*, 406 F.2d 560 (2d Cir. 1969), relied on by the appellant. There, the Government inadvertently failed to produce a statement for discovery and inspection that the court, after *in camera* inspection, had previously directed

be furnished to the defense, once again in circumstances that plainly would have affected defense strategy and a decision to take the stand. See also, *United States* v. *Baum,* 402 F.2d 1333 (2d Cir. 1973).

The standard to be applied, then, is the possibility of harm to the defendant—whether, under the circumstances presented, the revelation would have affected the defense's preparation for trial, new defenses added or the emphasis on old defenses shifted. Because the effects must be assayed on a case to case basis, the rule cannot be applied inflexibly.

Unlike the situation in *Lewis* and *Padrone,* the present claim that the revelation would have affected the defense strategy as to whether Johnson should have to take the stand is disingenuous at best. This is not a case where the Government misleads the defense by representing that it has no incriminating statements in its possession. The appellant took the stand in the face of a series of lengthy and detailed prior statements that had been produced prior to trial pursuant to agreement and that were known to him and his counsel, to have, implicated him in the crime. As the trial court found, he had no choice but to testify if he was to overcome the force of these voluntary admissions of guilt. It is manifest from the record that the defense strategy was premised exclusively on the appellant's best efforts to disavow those admissions by raising serious question as to his knowledge of their import and their voluntariness.

Despite appellant's bald allegations to the contrary, it is impossible to discern any specific showing of prejudice sufficient to overturn the conviction or the face of cumulative and overwhelming evidence of guilt. *See United States* v. *Fallen, supra,* 498 F.2d at 176; *United States* v. *Bryant, supra,* 439 F.2d at 648; *United States* v. *Crisona,* 416 F.2d 107, 115 (2d Cir. 1969); *United States* v. *Battaglia, supra,*

410 F.2d at 283; *Cf. Levin* v. *Clark*, 408 F.2d 1209, 1212 (1967). The material was produced at the conclusion of Agent Koletar's rebuttal testimony, the first indication of its existence and of the nature of its contents. Contrary to appellant's unsubstantiated claims to the contrary, Section 3500 requires nothing more. *Palermo* v. *United States*, 360 U.S. 343, 354 (1958); cf. *Lohman* v. *United States*, 266 F.2d 3, 5 (6th Cir. 1959). Vigorous cross-examination by the defense as to the contents of the memorandum followed.

Finally, appellant's protestations to the contrary notwithstanding, his claims of surprise are equally specious since Johnson had earlier testified during the suppression hearing that he had admitted using the proceeds of the robbery on narcotics and that Koletar took notes on the statements at the time (see transcript of May 11, 1973 at p. 181). In the face of the cumulative nature of the evidence against Johnson, the inference is compelling that the defense, now apprised of a further damaging admissions, simply maintained the only available course—to permit the appellant to take the stand and disavow the admissions. The failure to make available to the defense the written transcription of an admission previously testified to in open court was not in fact harmful.

POINT II

The District Court Properly Denied the Motion to Dismiss Under Rule 4 of the Plan.

Appellant next contends that the Government failed to comply with the Eastern District Plan, particularly Rule 4 [10] since it failed to communicate its readiness to proceed to trial within six calendar months of the arrest. Applying the appropriate exclusions detailed by Rule 5 of the Plan, however, the District Court was notified of the Government readiness well within the prescribed period.[11] The

---

[10] Rule 4 provides:

> In all cases the government must be ready for trial within six months from the date of the arrest . . . . If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government for dismissal of the indictment. . . . If it should appear that sufficient grounds existed for tolling any portion of the six-month period under one or more of the exceptions of Rule 5, the motion shall be denied, whether or not the government has previously requested a continuance.

[11] Appellant also claims a violation of Rule 3 of the Plan, providing that where incarcerated "the defendant shall be released upon bond or on his own recognizance or upon such conditions as the district court may determine . . ." if Government readiness is not communicated within three months. Even a cursory reading of the Rule indicates that dismissal of the charges is not contemplated. *United States* v. *Fernandez*, 480 F.2d 729 (2d Cir. 1973). Upon the expiration of the 90 day period, the District Court reduced bail on the day of the arraignment (August 2, 1972), to $25,000 personal surety (10% cash), an amount expressly agreed to by appellant and his counsel. When, on May 15, 1973, the trial court first learned that Johnson had been unable to post bond, the bail was reduced further to $5,000 personal surety (10% cash) and Johnson was released. Assuming *arguendo* that the three month period under Plan 3 had in fact expired, the mandate of Rule 3 was satisfied when defense counsel, in the presence of the appellant, consented to the initial bail reduction to $25,000 personal surety. In any event, as the trial court concluded, the time limitations were tolled for most, if not all, of the period in question. (Memorandum and Order, November 23, 1973, p. 11).

motion to dismiss the indictment pursuant to Rule 4 was properly denied by the trial court.

The record plainly belies appellant's claim that the Government failed to communicate formal or informal notice of readiness prior to trial. In point of fact, the Government formally communicated its readiness to proceed to the Court on the original trial date, December 11, 1972, when the trial was first adjourned to January 8, 1973, because defense counsel was unavailable due to previous trial commitments.[12] Although no written notice of readiness was filed with the Court, the Rules are satisfied by oral notice to the court within the prescribed period. See *United States* v. *Pierro,* 478 F.2d 386, 389, n. 3 (2d Cir. 1973); *United States* v. *Favalaro,* 493 F.2d 623 (2d Cir. 1973).[13]

Taking December 11, 1972, then, as the crucial date, the Government's notice of readiness followed the arrest by some 7½ months. The 7½ month delay, however, simply begins the inquiry since the mandatory six month rule must be construed in conjunction with the exclusionary

---

[12] Appellant makes much of the fact that he and his counsel were not present in court at the time that the Government readiness was communicated to the court. While the preferred practice is for the Government to inform both the defendant and the court, the Government's failure to inform the defendant does not warrant dismissal of the indictment. An inference of non-readiness arises only where the Government fails to inform the court of its readiness within the applicable period of time. See *United States* v. *Pierro,* 478 F.2d 386 (2d Cir., 1973).

[13] The trial court failed to reach the question whether a notice of readiness was informally provided on an earlier date. Though it admitted the possibility, the court refused to take evidence of the question in light of the disposition denying appellant's Rule 6 motion to dismiss. Consequently, in the event that this Court should find otherwise, it would be appropriate to remand this case to the district court for a hearing to determine whether oral notice of readiness was given at an earlier date.

provisions contained in Rule 5 of the Plan. The question for this Court, thus, reduces to whether the operative facts support the finding by the trial court that the Government's communication of readiness was timely under Rule 4, as extended by the tolling provisions detailed by Rule 5. Because the Rules deal with Government readiness, the fact that the trial did not take place for some time after the communication of readiness is of no moment.[14] *United States* v. *Oliver*, — F.2d — (2d Cir., June 17, 1975), slip op. 4063.

Appellant was arrested on April 24, 1972 and voluntarily agreed to cooperate with the arresting officers. The following day, at the arraignment, assigned counsel was apprised of his client's cooperation and authorized future interviews, assuring his client's continued cooperation in exchange for possible NARA treatment (See transcript of May 16, 1973, pp. 115-116, 122-123). During the month of May, 1972, appellant met with Government agents and on three separate occasions provided detailed statements as to his role in the crime and the identity of the other participants. Because of his continuing cooperation in this and in unrelated matters, the case, pursuant to an agreement between counsel, was marked down for waiver of indictment

---

[14] The delay from December 11, 1972 to December 5, 1973, is attributable to (1) adjournments on consent (December 11, 1973 to January 8, 1973 and April 6, 1973 to May 15, 1973); (2) substitution of counsel (January 8, 1973 to January 10, 1973); (3) determination of competency (January 10, 1973 to April 6, 1973) and (4) pretrial motions to dismiss (May 15, 1972 to December 5, 1973), all excusable periods under Rule 5 of the Plan. The subsequent ten month delay to the date of trial, October 11, 1974, can be attributed to calendar congestion. In the instant case, appellant Johnson made no demand for a speedy trial during this period, was not incarcerated, suffered no loss of testimony of a crucial witness or other prejudice because of the delay. Even if the period of Court delay is chargeable to the Government, there is not here present the other balancing factors which would justify resort to "the unsatisfactorily severe remedy of dismissal of the indictment" *Barker* v. *Wingo*, 407 U.S. 514 (1972).

and a plea to reduced charges on three separate occasions between May 26, 1972 and July 28, 1972 (Transcript, May 16, 1973, 122-123; See also transcript of January 8, 1973, p. 5). On July 28, 1972, despite a prior understanding between Johnson and the Government, the appellant advised the Assistant United States Attorney at the eleventh hour that here would be no plea as he intended to proceed to trial (See transcript of July 28, 1972, p. 15). Upon the Government's request to proceed before the Grand Jury, the matter was adjourned on consent to August 2, 1972, for arraignment (*Id.*, at p. 3). The following day the indictment was returned by the Grand Jury.

Given the facts of this case, there is no delay chargeable to the Government. From the date of the arrest, April 24, 1972, until July 28, 1972 the Government was engaged in the negotiations with Johnson for his cooperation in exchange for a plea to reduced charges and possible NARA Treatment (*Id.*, at p. 15). Relying on appellant's good faith, confirmed time and again by assigned counsel, the Government did not proceed against Johnson since it was possible that, for the final disposition of his case, no indictment would be necessary. Indeed, on the very day of his last meeting with Agent Koletar, May 26, 1972, the matter was on the Court calendar for waiver and a plea.

In his testimony at the suppression hearing, Johnson did not contest that he had agreed to cooperate with the Government, but only that his cooperation was a ploy to delay prosecution until his wife gave birth to their son (Transcript of May 16, 1973, p. 205). Under the circumstances it is of some significance that the leads Johnson provided the authorities had, in the interim, obviously proved fruitful. Bouyed by the accuracy of the information he had provided and its understanding with Johnson and his counsel—which Johnson only subsequently would seek to discredit—that the matter would be disposed of at the

appropriate time by plea and possible NARA treatment, the Government had no reason to suspect that the appellant harbored contrary intentions.

From the date of his arrest to the day the case was before the court for waiver and a plea, the Government had every reason to believe that Johnson was cooperating with its efforts to break the case and to investigate widespread narcotics traffic. That the matter was rescheduled twice more before the court for disposition prior to the indictment is attributable to what the trial court aptly characterized as Johnson's "gamesmanship" and the Government's good faith efforts to fulfill its part of the bargain (Memorandum and Order, November 23, 1973, p. 11). In sum, the entire period from the arrest on April 24 to the date that the Government first realized that there could be no disposition is excludable from the computation of time under Rule 4. *United States* v. *McDonough,* 504 F.2d 67 (2d Cir. 1974). No interest properly secured by Rule 4, the prevention of prosecutorial delay (*Hilbert* v. *Dooling,* 476 F.2d 355 (2d Cir.), *cert. denied,* 414 U.S. 878 (1973); *United States* v. *Bowman,* 493 F.2d 594 (2d Cir. 1974)), would be advanced by permitting appellant to invoke the Rule in connection with the period of time during which the Government reasonably believed he was cooperating.

This Court in a similar situation refused to sanction such a perversion of the Rules. In *United States* v. *Valot,* 481 F.2d 22 (2d Cir. 1973), the defendant agreed to cooperate with the Government in its efforts to enforce the drug laws in exchange for possible lenient treatment. When the Government learned that the defendant, who was supposedly cooperating, had returned to trafficking in drugs it proceeded to indictment on the original charges. Although the Government had filed its Notice of Readiness for trial within six months following the arrest, the defendant was not formally arraigned until six months and five days following the arrest. On appeal to this Court,

the contention that the delay in readiness during the period of cooperation contravened the six month rule was dismissed out of hand with a striking reprobation: "For appellant even to claim that the period of cooperation applies to the Speedy Trial Rules[*] offends reason; to use his own unconscionable perfidy as a basis for such a claim is even worse." 481 F.2d at 25.

There is no qualitative difference between Johnson's duplicity in the present case and that of the defendant in *Valot;* both encouraged prosecutorial delay then sought to use that delay against the Government. To hold that the resultant delay, under these circumstances, is chargeable against the Government would only serve to undermine defined and legitimate investigative needs often attending criminal prosecutions.

The delay subsequent to July 28, 1972 is, as the trial court concluded, attributable to defense requests for, and consents to, adjournments and pending motions also excludable under Rule 5. *United States* v. *Oliver,* — F.2d — (2d Cir. Slip op., Docket Number 74-2412, June 17, 1975). On July 28, 1972, defense counsel moved to reduce bail. Because of insufficient evidence of appellant's roots in the community, the Court reserved decision on the motion until August 2, 1972. On the adjourned date, August 2, 1972, the day of the arraignment on the indictment, the defense requested a two month adjournment and consented to fixing a trial date sometime after Labor Day. On October 25, 1972, the Court set the matter down for trial on December 11, 1972, the day that the Government communicated its readiness to proceed to trial.

---

* Second Circuit Rules Regarding the Prompt Disposition of Criminal Cases. Insofar as the Plan is modeled upon and supercedes the Second Circuit Rules, the purpose and goals of the Plan are the same. See *United States* v. *Furey,* 500 F.2d 338, 342, n. 3 (2d Cir. 1974).

In short, the delay from the day of the arrest to the communication of Government readiness on December 11, 1972, was attributable to the Government's reasonable belief as to Johnson's cooperation and negotiations regarding a disposition by plea and requests for adjournments. The entire period is thus excludable from computation of the time limitations prescribed in Rule 4. There is no question that the Government's communication of readiness was timely.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

Dated: August 1, 1975

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York,
225 Cadman Plaza East,
Brooklyn, New York 11201.

VICTOR J. ROCCO,
Assistant United States Attorney,
*Of Counsel.**

---

* The United States Attorney's Office wishes to acknowledge the invaluable assistance of Marc D. Teitelbaum, a third year law student at New York University Law School, in the preparation of this brief.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 4th day of August, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a Brief for Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Allen Lashley, Esq.
16 Court Street
Brooklyn, N.Y. 11241

Evelyn Cohen

Sworn to before me this
4th day of August 1975

Irene B. Cohen (Bevilacqua)

IRENE B. COHEN (BEVILACQUA)
Notary Public, State of New York
No. 24-0583965
Qualified in Kings County
Commission Expires March 30, 1977

NOTICE that the within
for settlement and signa-
of the United States Dis-
office at the U. S. Court-
n Plaza East, Brooklyn,
day of ,
clock in the forenoon.

New York,
, 19

ates Attorney,
for

NOTICE that the within
duly entered
day of
the office of the Clerk of
Court for the Eastern Dis-

New York,
, 19

ates Attorney,
for

Action No.

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

United States Attorney,
Attorney for
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within
is hereby admitted.
Dated: , 19

Attorney for

FPI-LC-5M-6-73-7355

★ U. S. Government Printing Office 1975— 614—353—130